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No. 99-1760

IN THE

Supreme Court of the United States

SMITHFIELD FOODS, INC.,
SMITHFIELD PACKING COMPANY, INC., AND
GWALTNEY OF SMITHFIELD, LTD.,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Government does not deny the regulatory clash between federal and state authorities giving rise to this case: Smithfield spent millions of dollars under a compliance agreement with state authorities charged with primary enforcement of Virginia's more stringent, state effluent limitations contained in a state-issued permit; Smithfield was then hit with this federal penalty action for violating the very state effluent limitations that state authorities had assured Smithfield it had met by agreeing to take corrective action it was not otherwise obligated to take. Nevertheless, the United States asks this Court to dismiss the multiple conflicts engendered by the decision of the Court of Appeals below, overlook the compelling federalism issues raised by this case, and disregard the fact that Smithfield was whipsawed by the conflicting demands of federal and state regulators to the tune

of over $12 million.[1] This Court should grant certiorari to resolve those conflicts, uphold the principles of federalism and comity that Congress specifically sought to promote in enacting the Clean Water Act, 33 U.S.C. § 1251 *et seq.* ("CWA"), and ensure that regulated parties are treated fairly where—as here—federal and state authorities impose inconsistent obligations on parties attempting to comply with the law.

1. The United States refuses to acknowledge the conflict between the decision below and *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). The Government contends that Smithfield's reliance on *Gwaltney* is "misplaced" because the decision "does not address the relationship between federal and state enforcement." Opp. 12, 13. But the Government glibly overlooks the fact that this Court's concern—that a second suit might curtail the primary enforcer's discretion—is equally implicated by a penalty action brought by EPA that would undermine the discretion of a State "to enforce the Act in the public interest" when the State acts—like the Commonwealth here—as the primary enforcer of the CWA. 484 U.S. at 60-61. That is clear from *Gwaltney* itself. *See id.* at 61 ("The same might be said of the discretion of state enforcement authorities."). *Gwaltney* confirms that the right of a State to enforce a standard under the CWA includes the discretion not to seek penalties in order to achieve a more significant environmental objective, and that federal authorities should not be permitted to bring a penalty action that frustrates the ability of a State to achieve precisely the sort of broad remedial action contemplated in *Gwaltney* and secured by the

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[1] The Government highlights the fact that Smithfield admitted to reporting and recordkeeping violations. *See* Opp. 7-8. As the record shows, however, those violations were the work of a single rogue employee, *see* Pet. App. 57a, and they are not implicated by any of the questions presented by this case.

Board here—the complete elimination of Smithfield's discharges into the Pagan River, as well as the removal of the pollutants of the Town of Smithfield and other area residents.[2]

The United States also argues that *Gwaltney* does not foreclose this penalty action because the CWA allows EPA to seek civil penalties for "past violations of a state-issued NPDES permit that imposes more stringent conditions than EPA might require." Opp. 13. Congress, however, *expressly* reserved to the States in Section 510 of the CWA the "right" to "adopt *or enforce*" effluent limitations and standards more stringent than those imposed by federal law. 33 U.S.C. § 1370(1)(A) (emphasis added). As we have explained (Pet. 13-15), this statutory reservation of authority would be meaningless if EPA were permitted to thwart the efforts of a State to enforce its own, more stringent environmental standards in the manner it deems best serves the public interest by seeking penalties that the State has chosen to

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[2] Further attempting to distinguish *Gwaltney*, the United States contends that Smithfield chose to connect to HRSD "for reasons of cost-effectiveness and future flexibility," and not because it was "pressured by the threat of penalties to choose a more expensive treatment method than [it] would otherwise have chosen out of economic self-interest." Opp. 13 n.3. To the contrary, HRSD was not the low-cost compliance solution for Smithfield. The record in fact shows that Smithfield incurred much greater costs by connecting to HRSD than it would have if it had complied through an on-site facility. *See* Trial Tr. 656-657; Def. Ex. 49. But even if connecting to HRSD had been more cost-effective, that option was not available in 1993, the time at which the Unites States contends Smithfield was required to comply. At that time, the only way Smithfield could have complied was through the construction of an on-site facility. Had it done so, Smithfield would have had no reason to incur the additional expense of connecting to HRSD. Securing Smithfield's agreement to (1) connect to HRSD and (2) abandon its judicial challenge to the phosphorous limit—both of which Smithfield was not obligated to do—required the Commonwealth to exercise its discretion in the manner contemplated in *Gwaltney*.

forgo, and *Gwaltney* teaches that federal authorities should not be permitted to do so.

The Government's answer to Section 510—which begins "Except as expressly provided in this chapter"—is that the "except" clause allows EPA to bring suit under its general authority to enforce effluent limitations in NPDES permits that are based on more stringent state standards, regardless of the effect on a State's ability to enforce its own, more stringent standards.[3] *See* Opp. 14. Again, that reading would render Section 510 virtually meaningless. The more sensible reading is that Section 510 allows EPA to interfere with more stringent state standards only where the CWA expressly so provides. This construction—unlike the Government's—squares with other sections of the CWA that expressly authorize EPA to establish and enforce preemptive alternative standards. For example, Section 316 allows EPA to grant a variance from otherwise applicable standards with regard to thermal discharges, *see* 33 U.S.C. § 1326(a), and where such a variance is obtained, a State may not enforce its more stringent standards. Review is thus warranted to ensure that Section 510 is given effect and to protect the right of States to enforce their own, more stringent standards in the manner they deem best.[4]

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[3] Although the United States claims that Smithfield "argue[s] that Section 510 * * * effectively grants the States the exclusive authority to enforce more stringent state law standards," Opp. 14, that is simply not so. Smithfield has never contended that the States have the *exclusive* authority to enforce their own, more stringent standards. Rather, Smithfield argues—based on the plain language of the statute—that Section 510 merely precludes EPA from taking any action that interferes with a State's ability to enforce such standards in the manner it deems most beneficial to the public interest.

[4] The United States asserts that the Eighth Circuit's decision in *Harmon Industries, Inc.* v. *Browner*, 191 F.3d 894 (8th Cir. 1999)—in which the court refused to permit a federal overfile action, reasoning that such actions would undermine the efforts of the States to negotiate with

2. The United States also refuses to acknowledge the conflict that exists between the decision of the Court of Appeals below and those of the First and Eighth Circuits in *North & South Rivers Watershed Ass'n* v. *Town of Scituate*, 949 F.2d 552, 556 (1st Cir. 1991), and *Arkansas Wildlife Federation* v. *ICI Americas, Inc.*, 29 F.3d 376, 381 (8th Cir. 1994), *cert. denied*, 513 U.S. 7147 (1995), on the preclusive effect of Section 309(g)(6)(A)(ii) of the CWA. As we explained (Pet. 18-19), the Fourth Circuit below engaged in an exceedingly narrow reading of that provision by effectively insisting that state law "mimic" federal law to trigger preclusion.[5] The First and Eighth Circuits, by contrast, have deliberately eschewed such a restrictive application of Section 309(g)(6)(A)(ii). *See Town of Scituate*, 949 F.2d at 556 (rejecting a "narrow reading" of the provision); *Arkansas Wildlife Fed'n*, 29 F.3d at 381 (state law need not be "identical" to federal law). Rather than insist on exact equivalency between state and federal law, those courts have assessed comparability by looking to the "overall [state] regulatory scheme," and considering whether state and federal law share the "same overall enforcement goals." *Arkansas Wildlife Fed'n*, 29 F.3d at 381; *accord Town of Scituate*, 949 F.2d at

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regulated entities—is not relevant here because *Harmon* involved a different statute and the CWA "contains different and additional language expressly stating that state NPDES programs under the [CWA] do *not* preempt federal enforcement." Opp. 14-15 n.4 (emphasis in original). As we have explained (Pet. 16 n.8), however, the United States' authority to overfile under the CWA is not boundless.

[5] The United States contends that the Court of Appeals did not effectively embrace such a requirement, claiming that its decision "neither states nor implies such a requirement." Opp. 16. But in rejecting the application of Section 309(g)(6)(A)(ii) even though Virginia law at all relevant times provided—like Section 309(g)—for substantial penalties for violations of state permits and significant opportunities for public participation, the Fourth Circuit did precisely that.

556.[6] Under that approach, Virginia's "overall regulatory scheme" is "sufficiently comparable" to federal law. 29 F.3d at 381. *See* Pet. 22-23.

Attempting to sidestep this fundamental conflict, the United States focuses on the differences between Virginia law and the Massachusetts and Arkansas statutes that were at issue in *Town of Scituate* and *Arkansas Wildlife Federation*. Those differences are not only immaterial, but beside the point.[7] Both the First and Eighth Circuits recognized that "comparable" does *not* mean "identical."[8] The Fourth Circuit effec-

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[6] Expressly relying on *Town of Scituate* and *Arkansas Wildlife Federation*, the Sixth Circuit has followed the same approach as the First and Eighth Circuits. *See Jones* v. *City of Lakeland*, 175 F.3d 410, 415 (6th Cir. 1999) (rejecting "a narrow, exacting interpretation of the word 'comparable' that requires one-for-one equivalency"), *reh'g en banc granted*, 204 F.3d 680 (1999). *See also* Pet. 21-22 n.11.

[7] The United States argues that Virginia law differs from the Massachusetts statute because that statute "provid[ed] for nonconsensual assessment of administrative penalties and * * * for public participation in the penalty assessment process," and from the Arkansas statute because that statute "authoriz[ed] administrative penalties of up to $10,000 per day, * * * supported by regulations allowing public participation." Opp. 17. At all relevant times, however, Virginia law provided for public participation in the enforcement process, just like the Massachusetts and Arkansas statutes. *See* Pet. 18. Similarly, at all relevant times, Virginia law provided for the imposition of penalties in a manner that achieved the same ends as those statutes. *See* Pet. 17-18. Indeed, in April 1996—while the Board was still conducting its administrative action and before EPA filed its penalty action—Virginia law was amended to provide for the imposition of administrative penalties without consent. *See* Va. Code §§ 10.1-1182, 10.1-1186(5), (10).

[8] As discussed in the petition (pp. 19-20), this interpretation squares with the plain meaning of the statute, *see Webster's Third New International Dictionary* 461 (1986) ("comparable" means "having *enough* like characteristics or qualities to make comparison appropriate," or "permitting or inviting comparison *often in one or two salient points only*") (emphases added), as well as with this Court's understanding of the term "comparable." *See Wheeler* v. *Barrera*, 417 U.S. 402, 420 (1974)

tively held the opposite. Thus, while Virginia law is sufficiently comparable to Section 309(g) under the approach taken by the First and Eighth Circuits, it flunks under the Fourth Circuit's approach.

The United States likewise attempts to deny the circuit conflict on the scope of Section 309(g)(6)(A)(ii), and that the decision below deepens that conflict. Opp. 18 n.5. That a conflict exists between the First and Eighth Circuits, on the one hand, and the Ninth Circuit, on the other, cannot be seriously disputed. In ruling on the scope of Section 309(g)(6)(A)(ii), the Ninth Circuit expressly rejected the First Circuit's reasoning in *Town of Scituate*—on which the Eighth Circuit expressly relied in *Arkansas Wildlife Federation*—and gave that provision an extremely narrow reading. *See Citizens for a Better Env't-Cal. v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1117-18 (9th Cir. 1996), *cert. denied*, 519 U.S. 1101 (1997). Indeed, numerous commentators have recognized the conflict and called for its resolution. *See* Pet. 23. By similarly giving Section 309(g)(6)(A)(ii) an overly restrictive reading in contrast to the First and Eighth Circuits, the decision below intensifies that conflict. This Court should grant review not only to resolve it, but to ensure that Section 309(g)(6)(A)(ii) is given effect according to its terms.[9]

("'comparable' * * * does not mean 'identical'"). The United States does not deny that the Fourth Circuit's approach conflicts with the plain meaning of the statute.

[9] The United States suggests that review is not warranted because Virginia has revised its laws to expand its authority to administer penalties and to provide further opportunities for public participation. *See* Opp. 17-18. But despite such revisions Virginia law still does not "mimic" federal law, as the Fourth Circuit requires. The decision below will thus have a continuing effect beyond this case. Moreover, comparability under Section 309(g) should be gauged at the time the federal penalty action is filed. *See* Pet. 18 n.9.

3. The United States also asserts that "[n]o * * * conflict exists" between the Fourth Circuit's decision and those of other federal courts of appeal on the notice required before a party may be penalized for violating regulatory standards. *See* Opp. 18. As we explained (Pet. 26-27), the Fourth Circuit's decision concluding that Smithfield had fair notice that it was violating the CWA—even though state and federal authorities clearly disagreed over whether Smithfield was in compliance with the state limitations contained in Smithfield's permit and Smithfield relied on assurances from the primary regulating authority that it would be in compliance by investing millions of dollars in taking extreme corrective action—squarely conflicts with decisions of the D.C., Ninth, Tenth, and Fifth Circuits holding that parties lacked fair notice where authorities differed on whether certain conduct was prohibited or required, as well as with the position of the Sixth Circuit on whether a party lacks fair warning of what is required where "common understanding" is otherwise.

The Government does not even attempt to address any of these decisions, and argues instead that because Smithfield's permit contained a phosphorous limitation and the CWA provides for civil penalties for permit violations, Smithfield was "on notice that failure to comply with the terms of [its] NPDES permit could subject [it] to a federal civil enforcement action and civil penalties." Opp. 19. But that argument ignores the fact that Smithfield specifically sought and obtained assurances from the Board that it *would be in compliance* with the state limits in its state-issued permit so long as it connected to HRSD within the requisite timeframe, and that Smithfield was aware that EPA *knew* of its agreement and correspondence with Virginia regulatory authorities, yet did nothing for five years before suing Smithfield for failing to meet the very limits the Board had assured Smithfield it need not meet during the interim. If anything, the absence of fair notice in this case is even more egregious than in the other decisions the Government fails to confront.

The Government's assertion (Opp. 20) that the Special Orders did not modify Smithfield's permit is flatly contradicted by the Board's assurance that "[a]ny special order agreements relative to compliance * * * that have been approved by the Board take precedence over the VPDES permit," 4th Cir. J.A. 86, and rests on the same flawed reasoning of the Fourth Circuit below: that "[t]he Board's Special Orders or letters dated *before* the issuance of the 1992 Permit cannot logically change the terms of a more recent Permit approved by the Board and the EPA." Pet. App. 96a (emphasis in original). Both the Government and the Fourth Circuit overlook the fact that Smithfield sought assurance from the Board *after* it received a draft permit that carried forward the standards in its 1990 permit. In response, the Board gave Smithfield the requested assurance—in writing. The permit maintained the phosphorous and other state limits, as well as compliance dates, to provide a point of reference in the event Smithfield failed to connect to HRSD in accordance with its agreement with the Board—an agreement reflected in the 1991 Special Order, which "[took] precedence" over that permit. *Id.*[10]

In a final attempt to avoid review, the United States asserts that Smithfield's fair notice claim "rests on the specific facts of this case" and "presents no legal issue of general importance warranting this Court's review." Opp. 20-21. To the contrary, as we have noted (Pet. 28), this case has vast implications for myriad regulated entities which now potentially face inconsistent obligations of the sort to which Smithfield was subjected as a result of the decision below.

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[10] The Government, like the Fourth Circuit, also overlooks the fact that in 1994—well *after* the 1992 Permit was issued—the 1991 Special Order was amended to provide that Smithfield "may achieve compliance with the [other state law effluent limitations contained in the 1992 Permit] by connecting to the HRSD system." 4th Cir. J.A. 166.

This Court should grant review to decide the important questions raised in the petition.

* * *

For the foregoing reasons, and those in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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